No. 84-76

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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NELL HUNTER, *et al.* individually, and on behalf of all other members of Board of Registrars in the State of Alabama,

*Appellants,*

v.

VICTOR UNDERWOOD and CARMEN EDWARDS, for themselves and all others similarly situated,

*Appellees.*

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APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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## BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF APPELLEES

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NELL HUNTER, et al. INDIVIDUALLY,
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BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE
AND EDUCATIONAL FUND, INC.

---

## STATEMENT OF INTEREST OF AMICUS CURIAE

The NAACP Legal Defense and Educational Fund, Inc. is a non-profit corporation which was established for the purpose

of assisting black citizens in securing their civil rights. It has been cited by this Court as having "a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." NAACP v. Button, 371 U.S. 415, 422 (1963). The Legal Defense Fund has appeared before this Court on numerous occasions representing parties or as amicus curiae in cases raising constitutional and statutory issues concerning the right to vote.[1]

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[1] See e.g., Rogers v. Lodge, 458 U.S. 613 (1982) (amicus curiae); City of Mobile v. Bolden, 446 U.S. 55 (1980); United Jewish Organizations v. Carey, 430 U.S. 144 (1977); East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976); Allen v. State Board of Elections, 393 U.S. 544 (1969); Anderson v. Martin, 375 U.S. 399 (1964); Smith v. Allwright, 321 U.S. 649 (1944).

This case presents intertwined questions involving the grounds for disenfranchisement of voters and the proof and significance of racially invidious intent. The Legal Defense Fund is actively involved in challenging State standards, practices and procedures which abridge the right to vote. These State restrictions fall with greatest weight on blacks, other minorities, and the poor. The Court's resolution of the issues presented by this case may materially affect the ability of amicus to advance its program of vindicating the right to vote.

Letters consenting to the filing of this brief by both parties are being lodged with the Clerk of Court.

## SUMMARY OF ARGUMENT

The issues raised by this case go to the heart of American democracy -- the right to vote, and the right to be free from invidious racial discrimination.

The right of suffrage, the right which is "preservative of all rights," Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886), is the cornerstone of the American political system. A state's denial of the right to vote to any member of the community may be sustained as constitutional only if it is narrowly tailored to promote a compelling state purpose.

The clause of Section 182 of the Alabama Constitution of 1901 which the court below declared violative of the United States Constitution is precisely the type of State restriction of the franchise which this Court has stated must receive "close and exacting examination."

Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 626 (1969). The clause completely denies the right to vote to otherwise eligible citizens of Alabama convicted of crimes not punishable by imprisonment in the penitentiary -- e.g., misdemeanors -- involving "moral turpitude." Such a denial of the right to vote may be sustained only if it is necessary to promote a compelling State purpose.

It is at the point of inquiry into the State's purpose, however, that the denial of the right to vote becomes joined with an even uglier affront to American democracy -- invidious racial discrimination. The United States Court of Appeals for the Eleventh Circuit found, and the historical record fully supports this finding, that the clause was adopted for racially invidious reasons, as part of a broad and thoroughgoing program of white

Alabamians to disenfranchise blacks.

Appellants, however, argue that the clause may be sustained because it was adopted as an element of a disfranchisement scheme aimed as well at "populists" or "poor whites," not just blacks. This argument, even if it were a correct reading of the State's purpose, does not help their case. The denial of the right to vote on grounds of political belief or socio-economic status is as impermissible as disenfranchisement by reason of race. Like discrimination against blacks, discrimination against poor whites or Populists cannot be a compelling state interest.

Appellants remaining arguments are no more than makeweights. While this Court has held that the disenfranchisement of felons does not, in and of itself, violate the Equal Protection Clause of the

Fourteenth Amendment, Richardson v. Ramirez, 418 U.S. 24 (1974), this case does not involve the disenfranchisement for commission of a crime simpliciter. Rather, this case turns on a disenfranchisement clause adopted for constitutionally proscribed reasons -- either invidious racial animus as appellees allege and the Eleventh Circuit found, or political and wealth-based discrimination as appellants contend. Richardson v. Ramirez can provide no shelter for a measure which was intended to deny the franchise to a group of voters because of the color of their skin, their lack of assets, or their political beliefs. Nor does the Tenth Amendment provide a shield for a denial of the franchise in violation of the Equal Protection Clause of the Fourteenth Amendment.

Finally, the clause in question violates section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(a). As amended in 1982, section 2 bars the use of voter qualifications which result in a denial of the right to vote on account of race or color. Even if the adoption of the clause is held not to have been the product of invidious racial intent in violation of the Fourteenth Amendment, it surely results in a denial of the right to vote on account of race or color.

## I. VOTING IS A FUNDAMENTAL RIGHT WHICH MAY NOT BE DENIED UNLESS NECESSARY TO PROMOTE A COMPELLING STATE PURPOSE.

The Court has frequently emphasized the central role played by the right to vote in the American system of constitutional government. The right to vote "is of the essence of a democratic society, and any restrictions on that right strike

at the heart of representative government." Reynolds v. Sims, 377 U.S. 533, 555 (1964). "No right is more precious.... Other rights, even the most basic, are illusory if the right to vote is undermined." Wesberry v. Sanders, 376 U.S. 1, 17 (1964). See also Evans v. Cornman, 398 U.S. 419, 422 (1970).

In order to secure fully our system of democratic self-government, state restrictions on the right to vote have often been found constitutionally invalid upon close examination. The right to vote may not be taxed, Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); one person's vote may not be given less weight than any other person's, e.g., Reynolds v. Sims; Wesberry v. Sanders; and the State may not unduly restrict the ability of new parties or independent candidates to obtain positions on the

ballot. See, e.g., Anderson v. Celebrezze, 460 U.S. 780 (1983); Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979); Williams v. Rhodes, 393 U.S. 23 (1968). Cf. Clements v. Fashing, 457 U.S. 957, 964-65 (1982).

Burdens on the right to register and cast a ballot, the heart of the constitutionally protected right to vote, are subject to strict scrutiny. "[I]f a challenged state statute grants the right to vote to some bona fide residents of requisite age or citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest." Kramer v. Union Free School Dist., supra., 395 U.S. at 626-27. In such a case, "the general presumption of constitutionality afforded state statutes

and the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions made are not applicable." Id. at 627-28. Rather, the state must show "substantial and compelling reason" for the denial of the franchise, Dunn v. Blumstein, 405 U.S. 330, 335 (1972) and must utilize the "least restrictive means" to achieve that goal. Id. at 353.

The lower federal courts have recently decided or are currently considering dozens of cases challenging state-imposed barriers to voting under the First and Fourteenth Amendments.[2] The

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[2] The courts have recognized that state administrative practices, such as limitations on voter registration to inconvenient times and locations, or discrimination in the appointment of voter registrars on grounds of race or political affiliation, can effectively abridge the ability of citizens to register, and therefore implicate the right to vote. See, e.g., United States v. Marengo Co. Comm'n, 731 F. 2d 1546, 1569-70 (11th Cir.

ramifications of the arguments made in this case go well beyond the narrow issue of denying the franchise to certain misdemeanants.

For example, in Connecticut Citizen Action Group v. Pugliese, No. 84-431 (WWE) (D. Conn. Sept. 25, 1984), stay den'd, ___ F.2d ___ (2d Cir. Oct. 2, 1984), the Court ordered the appointment of thirty special assistant registrars to conduct registration door-to-door and at various sites in the community. That case involves the claim that holding registration at only one location in the city of Waterbury, Connecticut violates the First and Fourteenth Amendments.

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1984); Rhode Island Minority Caucus, Inc. v. Baronian, 590 F. 2d 372 (1st Cir. 1979).

In Rhode Island Minority Caucus, Inc. v. Baronian, 590 F.2d 372 (1st Cir. 1979), the Court held that allowing registration drives to be conducted only by members of the League of Women Voters is unconstitu tional if racial animus played a part in the decision. Several courts have enjoined state and local refusals to permit registration forms to be distributed in public agency waiting rooms. E.g., Project Vote! v. Ohio Bureau of Employment Services, 578 F. Supp. 7 (S.D. Ohio 1982).

Other cases challenging barriers to voting are pending. In Georgia, for example, citizens in many counties must travel distances of 60 miles or more in order to register at county courthouses which are open only during normal business hours -- when most citizens are at work. The difficulty in registering is com-

pounded by the fact that the state has no rural public transportation. The failure to permit registration at satellite locations and during evening and weekend hours is currently being challenged in the case of Voter Education Project v. Cleland, No. 84-1181A (N.D. Ga.). Similar registration barriers are at issue in cases in Louisiana, Michigan, Arkansas, Missouri, and Mississippi.

The devastating effect of such barriers to registration was recently documented by a congressional subcommittee. After the Voting Rights Act: Registration Barriers, Report of the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 98th Cong., 1st Sess. (October 1984). The subcommittee concluded:

A number of states limit registration to a single central location in a county, usually the county courthouse. ...

Many registration offices are open only on weekdays and during normal business hours. Many offices are closed during lunch hours. In Virginia, most registration offices only have regularly scheduled office hours between 8 am-5 pm. Over half are not open 5 days a week, and one quarter are only open one or two days a week. These limited hours conflict with the working hours of most people. Thus, working people must take time off from work in order to register.

... Courthouses are rarely located in the minority community, so minority citizens are required to go to an unfamiliar part of town to register.... [I]n rural areas, the long distances to the courthouse coupled with the lack of public transportation turns getting to the courthouse into a Herculean effort.

Third is the problem of intimidation. In Johnson County, Georgia, the white sheriff makes a point of stationing himself outside of the door of the voter registration office in the courthouse when blacks come to register ...

... In Shenandoah County, Virginia, the registrar's office is located in the basement of the county jail.

> In Waterbury, Connecticut ... the registrar refuses to deputize any volunteers. In other places, deputization is done selectively. In Worcester, Massachusetts, the registrar does not deputize volunteers from the poor side of town ....
>
> The technicalities of the form also raise barriers. In New York, signatures are required on both sides of the form, otherwise the registration is invalid. Other states require the form to be notarized. This requires the registrant to find a notary public, and usually involves a fee for the service. In effect, this may work as an illegal poll tax.
>
> Dual registration is yet another barrier to full electoral participation. This requires citizens to register separately for both city and county elections....
>
> Purge laws, while not facially objectionable, may operate unfairly. Seven states purge voters without individual notice. In Alabama, selected counties with a higher percentage of black voters have been purged. Subcommittee Report at 4-10.

Acceptance of appellant's argument that the states have absolute, unreviewable control over voting requirements and

qualifications would permit the continued existence of several barriers and obstacles to voting, such as those described above. Yet, these modern-day versions of the poll tax are no more constitutionally acceptable than their historic predecessors. Preservation of the precious right to vote requires that all barriers to voting be subjected to strict constitutional scrutiny and permitted only when justified by compelling governmental interests.

In this case, appellants have failed to offer any compelling state interest which could justify the denial of the franchise effected by the challenged clause of Section 182. On either appellants' or appellees' theory of the purposes of the framers of the Alabama Constitution of 1901, the clause was

adopted for a constitutionally proscribed reason and not to serve a compelling state interest.

## II. THE MISDEMEANANTS DISENFRANCHISEMENT CLAUSE WAS ADOPTED FOR INVIDIOUS RACIALLY DISCRIMINATORY REASONS IN VIOLATION OF THE FOURTEENTH AMENDMENT

The Court of Appeals found that the misdemeanants disenfranchisement clause of Section 182 of the Alabama Constitution was adopted with the intent, and has had the effect, of disenfranchising blacks. (J. S. at A-6 through A-141.) The court properly applied the test for determining discriminatory intent set forth by this Court in Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), and its conclusion is amply supported by the legal and historical record.

In Arlington Heights, the Court identified the factors which may be used to prove that a law, while fair on its face, was adopted for an invidiously discriminatory purpose: "The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes." 429 U.S. at 267. "The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." Id. at 268. "The impact of the official action -- whether it 'bears more heavily on one race than another,'... -- may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when

the governing legislation appears neutral on its face." Id. at 266, quoting Washington v. Davis, 426 U.S. 229, 242 (1976).

The Eleventh Circuit properly relied on each of these factors in reaching its determination that the disenfranchisement clause in this case was adopted for racially discriminatory purposes.

The "historical background" to Section 182 is clear: "[B]eginning in 1890, the States of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia enacted tests still in use which were specifically designed to prevent Negroes from voting." South Carolina v. Katzenbach, 383 U.S. 301, 310 (1966). The Alabama Constitutional Convention of 1901 "assembled largely, if not principally, for the purpose of changing the 1875 Constitution

so as to eliminate Negro voters." United States v. State of Alabama, 252 F. Supp. 95, 98 (M.D. Ala. 1966) (three-judge court). "'What they want is a scheme pure and simple which will let every white man vote and prevent any Negro from voting,' reported the Birmingham Age-Herald about the delegates at the Alabama Constitutional Convention of 1901." Schmidt, Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 3: Black Disfranchisement from the KKK to the Grandfather Clause, 82 Colum. L. Rev. 835, 846 (1982).

The legislative history is also clear. "Delegate after delegate took the floor eager to be put on record as favoring 'the absolute disfranchisement of the Negro as a Negro'.... The Journals of the Convention leave absolutely no doubt as to what the delegates of the white

citizens of Alabama wished the Convention to accomplish: ... 'it is our intention, and here is our registered vow to disfranchise every Negro in the state...'" United States v. Alabama, supra, 252 F. Supp. at 98, quoting comments by convention delegate reported in the Official Proceedings.

In developing their program of disenfranchisement, the delegates took care to avoid the strictures of the Fourteenth and Fifteenth Amendments. Instead of directly curtailing the franchise on grounds of race, the suffrage committee "made resort to facially neutral 'tests that took advantage of differing social conditions. Disenfranchisement for commission of specified misdemeanors is in pari materia with the "grandfather clause," the poll tax, and the literacy test -- a clear pattern of measures

neutral on the surface but adopted for the purpose and having the effect of disenfranchising blacks, and which were subsequently declared invalid for that reason. See, e.g., Guinn v. United States, 238 U.S. 347 (1915) (grandfather clause), South Carolina v. Katzenbach, supra, 383 U.S. at 312, 333-34 (literacy test), United States v. State of Alabama, supra, (poll tax).

Although the clause at issue purports to utilize a racially neutral criterion -- misdemeanors involving moral turpitude -- moral turpitude was intentionally defined to bring about the disenfranchisement of blacks. The suffrage committee of the Constitutional Convention chose offenses that were believed to be peculiar to blacks' low income and social status, such as petty property offenses, and minor sex-related crimes. (J. S. at A-10,

citing P. Lewison, Race, Class and Party 81 (1963).) Appellants' own expert, Dr. Thornton, acknowledges that the disqualifying crimes were those "associated in the public mind with the behavior of blacks." Joint App. at A-23.

The brunt of the non-penitentiary offenses clause was, and still is, borne by blacks. Joint App. at A-26; J.S. at A-11. Thus, the elements of proving racally invidious discrimination identified in Arlington Heights -- historical background, legislative history, pattern of discriminatory enactments, and disparate racial impact -- are all present here.[3] Taken together they prove the

[3] Therefore, this case differs significantly from the veteran's preference upheld in Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1979). Unlike Feeney, in which the worthy and legitimate goals behind the veteran's preference were stipulated, the classification here is neither rationally based, traditionally justified nor beneficent. Indeed,

"'insidious and pervasive evil' of racial discrimination in voting." City of Rome v. United States, 446 U.S. 156, 174 (1980). A state restriction on the right to vote adopted for racially invidious reasons violates the Equal Protection Clause of the Fourteenth Amendment, Rogers v. Lodge, 458 U.S. 613, 621-22 (1982), City of Mobile v. Bolden, 446 U.S. 55, 66-67 (1980) (plurality opinion), as well as the Fifteenth Amendment. City of Mobile, supra, Gomillion v. Lightfoot, 364 U.S. 339 (1960), Guinn v. United States, supra.

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appellants concede racial antipathy behind the misdemeanant exclusion clause, and proof of its discriminatory purpose, contrary to the plaintiff's case against the Massachusetts veteran's preference, is not solely based on inferences from its disproportionate impact.

## III. DISENFRANCHISEMENT OF POOR WHITES BECAUSE OF THEIR POLITICAL BELIEFS OR LACK OF WEALTH VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS

Appellants contend that the misdemeanants exclusion clause of section 182 was not adopted solely because of anti-black racial animus, but rather was adopted for "political reasons," to disenfranchise as well "poor whites" or "populists." (Brief for Appellants at 9-10, 12). Appellants' theory is problematic as an interpretation of the 1901 Alabama Constitutional Convention, but even if appellants' theory were true it could not save the disenfranchisement clause.

Appellants' theory assumes that the "racial" and "political" purposes of the Alabama Constitutional Convention were distinct. To the contrary, in turn-of-the-century Alabama and throughout the

Deep South at that time politics and race were largely intertwined. See Schmidt, Principles and Prejudices, supra, 82 Colum. L. Rev. at 842-47. Even appellants' expert Dr. Thornton, acknowledges that the Constitutional Convention delegates sought to achieve their "political," anti-Populist, goal by "eliminating the black vote that had -- the courting of which had represented the principal threat from the point of view of conservative white democrats." (Joint App. at A-19.)

Moreover, in order to find that section 182 was "political" and not "racial", the court must ignore most of the historical record. Appellants urge the Court "not to be misled by reading or analyzing the proceedings of the Convention." (Brief for Appellants at 18.) The speeches and debates of the delegates, the anti-black statements, and the avowal of

anti-black purposes were all a "public relations gesture." (Joint App. at A-23, A-27). Appellants' expert acknowledges that "[i]f you read the four volumes of the official proceedings -- a fate I wouldn't wish on anyone --but if you happen to, you will come away with the sense that race simply dominates the proceedings of the Convention." (Id. at A-27). His solution is to ignore the statements and actions of the delegates and rely solely on their unstated intentions, as he divines them. Thus would appellants have the Court ignore the approach for identifying intent set forth in Arlington Heights and pursued by the Eleventh Circuit.

Most importantly, however, appellants' version of history cannot save the misdemeanants disenfranchisement clause from invalidation. On appellants' theory

the clause is constitutional because it was adopted with the intent to discriminate against "poor whites" or "Populists." Such a contention would be laughable if it were not so offensive. The franchise may no more be denied on grounds of political belief or lack of wealth than it may be for racial animus.

"'Fencing out' from the franchise a section of the population because of the way they may vote is constitutionally impermissible. '[T]he exercise of rights so vital to the maintenance of democratic institutions,' ... cannot be obliterated because of a fear of the political views of a particular group of bona fide residents." Carrington v. Rash, 380 U.S. 89, 94 (1965) "'[D]ifferences of opinion' may not be the basis for excluding any group or person from the franchise." Dunn v. Blumstein, supra, 405 U.S. at 355, quoting

Cipriano v. City of Houma, supra, 395 U.S. at 705-06. Accord, Evans v. Cornman, 398 U.S. 419, 422 (1970). As this Court observed in another context, "Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office.'" United Public Workers v. Mitchell, 330 U.S. 75, 100 (1947). These cases clearly establish that where the right to vote is at stake, political minorities as well as racial minorities -- "populists" as well as blacks -- are protected by the Equal Protection Clause. The desire to vanquish one's political opponents or "fence out" citizens holding unorthodox beliefs has never withstood strict scrutiny or been found to serve a compelling state interest to justify the denial of the franchise to the disfavored group. Indeed, a finding that section 182 was adopted out of an-

tipopulist or anti-poor white animus would compel the determination that it violates the Fourteenth Amendment.

"Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race ... are traditionally disfavored" where the franchise is at stake. Harper v. Virginia Board of Elections, 383 U.S. 663, 668 (1966). This Court has consistently held unconstitutional under the Equal Protection Clause wealth-based restrictions on the franchise, such as the poll tax, Harper, supra, excessive filing fees, Lubin v. Panish, 415 U.S. 709 (1974), Bullock v. Carter, 405 U.S. 134 (1972), and statutes restricting to taxpayers the right to vote on bond issues, Phoenix v. Kolodziejski, 399 U.S. 204 (1970), Cipri-

ano v. City of Houma, 395 U.S. 701 (1969). The right of suffrage of "poor whites" like that of blacks is protected by the Constitution and may not be denied by measures aimed at them because of their lack of wealth.

## IV. RICHARDSON v. RAMIREZ DOES NOT INSULATE THE MISDEMEANANTS' DISENFRANCHISEMENT CLAUSE FROM STRICT SCRUTINY.

Appellants contend that the misdemeanants disenfranchisement provision of section 182 is insulated from Equal Protection Clause review by virtue of this Court's decision in Richardson v. Ramirez, 418 U.S. 24 (1974). In Richardson, the Court considered that portion of section 2 of the Fourteenth Amendment which limited the penalty of reduced state representation in Congress to denials of the franchise "except for participation in rebellion, or other crimes." The Court

concluded that this provision gave "affirmative sanction" to "the exclusion of felons from the vote." Id. at 54.

The case sub judice differs from Richardson in two significant ways. First, the disenfranchising crimes in Richardson were felonies whereas the present case concerns an invidiously selected list of non-felonies. Richardson was predicated in part on an examination of the historical background of the Fourteenth Amendment. The Court noted that at the time of the Fourteenth Amendment's ratification most States had provisions in their constitutions which prohibited, or authorized their legislatures to prohibit, the exercise of the franchise by persons convicted of felonies. Congress, in readmitting the seceded states to the Union, authorized those states to deny the franchise for "participation in the

rebellion or for felony at common law'." 418 U.S. at 48,49. There was, however, no similar finding that the "historical understanding of the Fourteenth Amendment" confirmed the disenfranchisement of misdemeanants. Richardson has never been applied to uphold a disenfranchisement of non-felons.

Indeed, those states which disenfranchise citizens for criminal convictions have generally limited that penalty to convictions of election-related offenses, some subset of serious felonies, or at most all felonies and "infamous crimes." See generally Note, Restoring the Ex-Offender's Right to Vote: Background and Developments, 11 AM. Crim. L. Rev. 721, 727-29, 758-70 (1973); Special Project, The Collateral Consequences of a Criminal Conviction, 23 Vand. L. Rev. 929, 975-77 (1970). According to these two surveys,

published in the early 1970's, only two states, Alabama and Georgia disenfranchised for specified non-felony offenses, defined as involving moral turpitude. Note, supra, 11 Am. Crim. L. Rev. at 758-61 and 766 n. 217; Special Project, supra., 23 Vand. L. Rev. at 976 n.251. The current Georgia Constitution disenfranchises only persons convicted of "a felony involving moral turpitude." GA. Const. Art 2, sec. 1 para 3(a). (emphasis supplied). Consequently, Alabama may be the only state which today disenfranchises any category of non-felons.

The Court, however, need not resolve the applicability of Richardson to the exclusion of misdemeanants because what clearly sets this case apart from Richardson is not the felony/non-felony distinction but the finding of invidious discriminatory intent. There was no conten-

tion in Richardson that the disenfranchisement provision at issue was adopted for racially discriminatory purposes, or, for that matter, out of a political or wealth-based animus. Richardson considered only the question whether the denial of the right to vote to felons was per se unconstitutional.

The presence of discriminatory intent is central to this Court's interpretation of the Equal Protection Clause of the Fourteenth Amendment. See, e.g., City of Mobile v. Bolden, supra, Arlington Heights v. Metropolitan Housing Development Corp., supra, Washington v. Davis, 426 U.S. 229 (1976). Particularly where the right to vote is at stake, state laws or practices which would be constitutional if they were adopted for a legitimate purpose have been held unconstitutional if they were adopted for a constitutionally proscribed reason.

Thus, in City of Mobile v. Bolden, supra, and White v. Regester, 412 U.S. 755 (1973) the Court held that multi-member or at-large election districts are a constitutional voting mechanism. When such a system, neutral on its face, "is subverted to invidious purposes," it violates the Fourteenth Amendment. Rogers v. Lodge, 458 U.S. 613, 621-22 (1982); White v. Regester, supra, 412 U.S. at 765-70. Similarly, in Lassiter v. Northampton County Bd. of El., 360 U.S. 45 (1959), this Court held that a State's use of a literacy test to qualify voters is consistent with the Fourteenth Amendment. Yet, in South Carolina v. Katzenbach, supra, the Court held that where literacy tests "have been instituted with the purpose of disenfranchising Negroes, have been framed in such a way as to facilitate this aim, and have been

administered in a discriminatory fashion," literacy tests violate the Constitution. 383 U.S. at 333-34.

In other words, even if Richardson v. Ramirez is interpreted to authorize the State of Alabama, for legitimate reasons, to disenfranchise persons convicted of non-felonies involving moral turpitude, the case does not support such action when taken for a constitutionally proscribed purpose. Appellees allege and the Court below found that the State acted out of racial animus, which the Fourteenth Amendment prohibits. Appellants contend that the State acted out of wealth-based or political animus, which are also constitutionally forbidden justifications. Appellants have alleged no constitutionally permissible reason for the disenfranchisement of non-felons, let alone a compelling state purpose. Under these

circumstances, the Court must affirm the Court of Appeals' conclusion that the disenfranchisement clause violates the Fourteenth Amendment.

## V. THE TENTH AMENDMENT PROVIDES NO PROTECTION FOR A STATE DISENFRANCHISEMENT MEASURE WHICH VIOLATES THE FOURTEENTH AMENDMENT

Appellants argue that the State of Alabama has broad power secured by the Tenth Amendment to grant or deny the suffrage. But "no State can pass a law regulating elections that violates the Fourteenth Amendment...." Williams v. Rhodes, 393 U.S. 23, 29 (1968). The Thirteenth, Fourteenth and Fifteenth Amendments "were specifically designed as an expansion of federal power and an intrusion on state sovereignty." City of Rome v. United States, 446 U.S. 156, 179 (1980). Particularly in the area of voting rights the Civil War Amendments

"supersede contrary exertions of state power." South Carolina v. Katzenbach, 383 U.S. at 325. The principles of Tenth Amendment federalism articulated in National League of Cities v. Usery, 426 U.S. 833 (1976), do not constrain the Fourteenth Amendment. Fitzpatrick v. Bitzer, 427 U.S. 445, 451-56 (1976). See also City of Rome v. United States, supra, 446 U.S. at 178-80 (National League of Cities does not limit the Fifteenth Amendment). In short, the Tenth Amendment provides no independent justification for a state disenfranchisement measure which violates the Fourteenth Amendment.

## VI. THE MISDEMEANANTS DISENFRANCHISEMENT CLAUSE VIOLATES THE VOTING RIGHTS ACT.

As amended in 1982, section 2 of the Voting Rights Act, 42 U.S.C. § 1973(a) bars the use of any "voting qualification

or prerequisite to voting or standard, practice, or procedure....which results in a denial or abridgement of the right to vote of any citizen of the United States on account of race or color." The section prohibits not only official action taken or maintained for a racially discriminatory purpose, but also any official action that results in the impairment or denial of the right to vote of any citizen on account of race. United States v. Marengo County Commission, 731 F. 2d 1546 (11th Cir. 1984) appeal dismissed, 83 L.Ed.2d 311 (Nov. 5, 1984)(No. 84-243). Thus, "discriminatory intent need not be shown to establish a violation." Id. at 1564.

Section 2 plainly applies to State restrictions on the right to register, as well as to districting schemes that dilute minority voting strength. Harris v. Graddick, 593 F. Supp. 128, 132 (M.D. Ala.

1984). As the court below found, the disenfranchisement of misdemeanants disproportionately affects blacks (J. S. at A-11). Consequently, a prima facie case of a "voting qualification" which results in a denial of the right to vote on account of race is made out.

## CONCLUSION

For the reasons stated, the decision of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

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